No. 11,533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEPHEN SORRENTINO, also known as Vincent Sorrentino,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 15-16) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant, after a jury trial, of violations of the Harrison Narcotic Act (26 U.S.C. 2553 and 2557) and the Jones-Miller Act (21 U.S.C. 174). The indictment alleged in the first count that the defendant, on or about the 16th day of August, 1945, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium. In the second count, the indictment alleged that at the time and

place mentioned in the first count, the defendant fraudulently and knowingly did conceal and facilitate the concealment of the same smoking opium, which had been imported into the United States of America contrary to law, as said defendant then and there knew. (Tr. 2-3.)

The Court below had jurisdiction under the provisions of Title 28 U.S.C., Section 41, Subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 225, Subdivisions (a) and (d).

STATEMENT OF FACTS.

In appellant's "Statement of Facts", argument is confused with narration to such an extent that it is difficult to get a clear picture of what occurred. The facts are simple.

A Special Employee of the Government was introduced to the defendant by an informer. He had several conversations with him concerning narcotics and on one occasion was present when the informer asked the defendant to sell him a can of opium. The defendant agreed to do so and promised to return with it later that night. Upon his return the Special Employee saw the informer and the defendant enter a room. (Tr. 47-53.) A Narcotic Agent, hidden in an adjoining room, overheard the informer say, "Did you bring the can of mud?", and the defendant reply, "No, I didn't bring it; I will later on tonight or tomorrow." The informer then asked the defendant if

he wanted the money and he replied, "No, you can pay me at the time I deliver the stuff." (Tr. 24-25.)

Later the informer, in the presence of the Special Employee, told the defendant to bring the can of opium to a certain house in San Francisco at 5:00 P.M. the following day. (Tr. 52.)

At that time the Narcotic Agent searched the Special Employee and the informer, found that they had no narcotics, and saw them enter the house in question. A short time later he saw the defendant enter and then leave. The Special Employee and the informer emerged and the informer gave the Agent a can of opium. The Special Employee testified that the defendant had delivered the can of opium to the informer in his presence and accepted payment of the purchase price. (Tr. 26-30; 53-55.)

The appellant denied that he had ever discussed narcotics with the Special Employee and, while admitting his visit to the house at the time stated, denied that he had sold narcotics and claimed he had gone there to recover a camera. He denied having the conversation recorded above, which was overheard by the Agent. He claimed that his house had been searched on three occasions by Government officers and that at one of these times he was struck by a Narcotic Agent without provocation. (Tr. 103-116). The Government established that Federal Agents visited the defendant's home and searched it on three occasions: Once to serve a warrant of arrest for receiving stolen Government property, once to search for narcotics, and once to make the arrest

in the instant case. The Narcotic Agent testified that he once pushed the defendant when he became obstreperous. (Tr. 116-122.)

QUESTIONS.

1. Was it an abuse of judicial discretion for the trial Court to prohibit cross-examination which was designed to reveal the identity of the informer?

2. Do Counts One and Two of the indictment state separate and distinct offenses punishable as such?

ARGUMENT.

1. IT WAS NOT AN ABUSE OF JUDICIAL DISCRETION FOR THE TRIAL COURT TO PROHIBIT CROSS-EXAMINATION WHICH WAS DESIGNED TO REVEAL THE IDENTITY OF THE INFORMER.

It is a well established principle that information concerning the commission of a crime, given by a citizen to his Government, is a privileged communication and the courts will not compel or permit, without the consent of the Government, the disclosure of the information, the identity of the informer, or the circumstances which provided the informant with his knowledge.

Vogel v. Gruaz, 110 U.S. 311;

In re Quarles & Butler, 158 U.S. 532;

Mitrovich v. United States (C.C.A. 9), 15 F. (2d) 163;

McInes v. United States (C.C.A. 9), 62 F. (2d) 180.

The rule was admirably stated by Justice Blatchford in *Vogel v. Gruaz,* supra, in the following language:

> "The principle laid down in that case (Worthington v. Scribner, 109 Mass. 487) was that it is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws; and that a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

See also:

United States v. Moses, 4 Wash. C.C. 726;
Elrod v. Moss, 278 F. 123;
Arnstein v. United States, 296 F. 946;
Segurola v. United States, 16 F. (2d) 565, affirmed in 275 U.S. 106;
Froelich v. United States, 33 F. (2d) 664;
Goetz v. United States, 39 F. (2d) 903;
Shore v. United States, 49 F. (2d) 522;
Scher v. United States, 95 F. (2d) 64;
United States v. Krulewitch, 145 F. (2d) 76.

Some authorities admit a modification of the rule, and permit the trial Court in its sound discretion, to compel a disclosure in a criminal case when the information is *material* to determine the defendant's innocence.

Underhill's Criminal Evidence, 4th Ed. § 322, p. 634, states:

> "* * * when the question arises in a criminal trial and when the information is *material* to determine the defendant's innocence it would seem both reasonable and just that the necessity and desirability of the disclosure and the question whether the public interests would be benefited or would suffer, *should be solely for the judicial discretion upon the circumstances of the case.*" (Emphasis added.)

To the same effect:

Wigmore on Evidence, Vol. 5, § 2374;
Wilson v. United States, 65 F. (2d) 621;
Wilson v. United States, 59 F. (2d) 390;
Smith v. United States (C.C.A. 9), 9 F. (2d) 386.

The propriety of compelling a disclosure rests solely in the discretion of the trial Court and a refusal to compel a disclosure or the exclusion of testimony identifying the informant is not reversible error.

Underhill's Criminal Evidence, 4th Ed. § 332, p. 635, citing *Goetz v. United States* and *Segurola v. United States,* supra.

We respectfully submit that in the instant case the disclosure of the identity of the informer or of his place of residence (which would have the same effect) was not material to determine the defendant's innocence.

A Narcotic Agent overheard the defendant state to the informer that he would deliver a can of opium

to him at a later date. (Tr. 24-25.) This same Agent later saw the informer and a Special Employee of the Bureau of Narcotics enter a certain house. He testified that neither of them had narcotics in his possession. Within a few minutes he saw the defendant enter this same house. Later he saw him leave and shortly thereafter met the informer and the Special Employee, at which time the informer gave him a can of opium. (Tr. 25-29.) The Special Employee stated that he had been introduced to the defendant by the informer and that he met him on several occasions (Tr. 48-49); that on one occasion he saw the defendant and the informer go into a basement room of a certain hotel (the record discloses that this was the time and place where the Agent overheard the conversation concerning the delivery of the can of opium) (Tr. 49-50); that he had several conversations with the defendant about narcotics and, on the evening prior to the offense charged in the indictment, overheard the defendant promise the informer that he would sell him a can of opium, and heard the informer tell the defendant to bring it to a certain house at a definite time. (Tr. 52.) (It was at this house and at the time agreed upon that the Agent observed the events which he described above.) He further stated that the defendant came to the house in question at the time agreed upon and delivered the can of opium to the informer in his presence and collected the purchase price.

With these facts before him, the experienced trial Judge refused to permit cross-examination of the wit-

nesses designed to disclose the identity of the informer and the fact that he resided in the premises where the narcotic transaction occurred. It is difficult to imagine what fact "material to the defendant's innocence" appellant hoped to prove by this cross-examination. He claims that his purpose was to "show that at the time that that house was entered there was in that house cans of opium similar to this" (the can of opium in evidence). (Tr. 69.) It is interesting to note that the appellant offered no proof of this fanciful theory, even the defendant did not so testify; furthermore, the Special Employee on further cross-examination denied that he had ever seen any opium in the house of one Jerome Berry, whom the appellant consistently identified with the informer. (Tr. 72.)

We respectfully submit that if disclosure is to be compelled upon every fanciful theory advanced by the defendant, without any reasonable offer to prove the theory, the entire doctrine of privileged communications in such cases must be discarded. It is for this reason that the decision is placed in the discretion of the Court and that its decision, made with all the facts before it, will not be disturbed.

As the Court aptly said in *Wilson v. United States,* 59 F. (2d) 392:

> "A trial court must dispose of the cause before it."

In our opinion the trial Judge in this case realized that the appellant's offer of proof was not made in

good faith, that he could not hope to prove by any stretch of the imagination that there was opium in the house before he entered by cross-examination of the Government's witnesses, and that the true reason for the questions was an attempt to implant in the minds of the jury by innuendo and insinuation the idea that the informer was a person of low repute and one who might be in the illegal possession of opium.

The fundamental fallacy of appellant's argument lies in the assumption that such communications are privileged solely for the protection of the informer. On the contrary, the rule is based upon sound reasons of public policy to encourage all citizens to perform their duty in giving the Government information concerning an offense against its laws; and it is only in an exceptional case—where it is clearly made to appear that a grave injustice may be done—that the strict rule is relaxed. There was no evidence of such a danger in the instant case.

Vogel v. Gruaz, supra.

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2. COUNTS ONE AND TWO OF THE INDICTMENT STATE SEPARATE AND DISTINCT OFFENSES PUNISHABLE AS SUCH.

This point was definitely settled contra the appellant in *Silverman v. United States,* 59 F. (2d) 636, certiorari denied 287 U.S. 640, which held that sale (under the Harrison Act) and concealment (under the Jones-Miller Act) of narcotics are separate and distinct offenses and that conviction on both counts does not constitute double jeopardy.

Although the offenses charged in Counts One and Two grew out of one transaction, nevertheless two offenses are defined by statute and the proof necessary to sustain each count is different.

Hunt v. Hudspeth, 111 F. (2d) 42.

The same principle of law has been followed in many narcotic cases where two offenses growing out of the same transaction are prosecuted under a *single* statute.

See:

Gargano v. United States (C.C.A. 9), 137 F. (2d) 945;

Gargano v. United States (C.C.A. 9), 140 F. (2d) 118;

Parmagini v. United States (C.C.A. 9), 42 F. (2d) 721, certiorari denied 283 U.S. 818;

Palermo v. United States, 112 F. (2d) 922.

Copperthwaite v. United States, 37 F. (2d) 846, relied upon by appellant, is clearly distinguishable. In that case there was no independent evidence of the purchase of narcotics and the Court properly held that the two inferences (created by the presumptions established by law) which could be drawn from the possession of narcotics, i.e., that it had been unlawfully purchased and that it had been unlawfully imported with the defendant's knowledge, were insufficient to support convictions for both offenses.

In the instant case there was clear evidence of sale and clear evidence of concealment and the evidence required to sustain these separate charges was different.

In any event, the question is moot as the lower Court imposed concurrent sentences and the rule is well established that where a defendant is convicted on several counts of an indictment, the judgment and sentence will be sustained if he was properly convicted under any count which is sufficient in itself to support the judgment.

Whitfield v. Ohio, 297 U.S. 431, 438;
Gantz v. United States, 127 F. (2d) 498, 501;
Holiday v. United States, 130 F. (2d) 988, 990.

The tactics adopted by the appellant at the trial are carried over into his brief before this Court. Many statements of facts which are immaterial—and several of which are unsupported by any testimony in the record—are set forth, purportedly by way of argument, e.g., that the Special Employee was a felon; that this was not the usual type of "informer" case; that the Narcotic Agent did not search the house or arrest and search the defendant when he left it; that the Government had been trying to "pin a crime" on the defendant; that the Agents disliked him; that the Agents did not investigate the rumor that opium was being smoked in the hotel; that the informer was "apparently hired and paid". Here again the appellant, by insinuation and innuendo,—without a scintilla of proof in the record, and based solely on the unsupported statement of counsel—attempts to create the impression that he was "framed" by the Government Agents.

We respectfully submit that this is a common and obvious defense which is often resorted to in narcotic

cases which are developed by the use of an informer, by defendants who are "grasping at straws" to escape the consequences of their proven acts. In order to give any credence to such a charge in this case we must throw out the testimony of the Narcotic Agent and the Special Employee that each of them heard the defendant, on separate occasions, agree to sell and deliver a can of opium and the testimony of the Special Employee that he actually witnessed the delivery and saw the defendant accept the purchase price.

The fundamental weakness of the appellant's case is perhaps nowhere better stated than in his own brief, at page 15, where he says, "Disregarding Liberman for the moment, * * *." This the jury evidently refused to do.

CONCLUSION.

For the reasons stated we respectfully submit that the decision of the lower Court should be affirmed.

Dated, San Francisco, California,
July 23, 1947.

Respectfully submitted,

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